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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

8 JESUS GONZALEZ-QUEZADA,)
9)
Petitioner,) Case No. C11-639-RSM-BAT
10 v.) **REPORT AND**
11 ELDON VAIL,) **RECOMMENDATION**
12 Respondent.)
13 _____)

14 *Pro se* petitioner Jesus Gonzalez-Quezada, proceeding *in forma pauperis*, petitions for 28
15 U.S.C. § 2254 habeas relief from his jury-trial conviction for cocaine delivery. (Dkt. 11.) Mr.
16 Gonzalez-Quezada raises five habeas grounds: (1) the trial court erred by denying his right to
17 proceed *pro se* four times; (2) his conviction was based on false evidence; (3) a violation of the
18 appearance of fairness doctrine; (4) conspiracy; and (5) the trial court denied his right to appeal
19 and obstructed justice. The Court finds that Mr. Gonzalez-Quezada has not exhausted his state-
20 court remedies for Claims 4 and 5, and therefore recommends **DISMISSING** the mixed habeas
21 petition without prejudice *unless* he elects, in objections to this Report and Recommendation, to
22 delete the unexhausted claims and to proceed only with the exhausted Claims 1–3.¹ An
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¹ As discussed *infra*, if Mr. Gonzalez-Quezada makes such an election, the Court recommends

1 evidentiary hearing is unnecessary. The Court also recommends **DENYING** issuance of a
2 certificate of appealability.

3 I. BACKGROUND

4 In 2006, the State charged Mr. Gonzalez in two separate cases. *See State v. Gonzalez-*
5 *Quezada*, 2010 WL 4456869, at *1 (Wash. Ct. App. Nov. 8, 2010). King County No. 06-1-
6 054853 involved charges for stolen property, driving under the influence, and hit and run
7 (hereinafter “**stolen property case**”). *Id.* Mr. Gonzalez-Quezada was permitted to proceed *pro*
8 *se* in the stolen property case and was convicted as charged after a jury trial. *See State v.*
9 *Gonzalez-Quezada*, 2008 WL 2332599, at *1 (Wash. Ct. App. June 9, 2008).² The case at issue
10 in the present habeas petition, King County No. 06-1-05995-2, involved Mr. Gonzalez-Quezada
11 selling \$20 worth of cocaine to an undercover police officer (hereinafter “**drug case**”).
12 *Gonzalez-Quezada*, 2010 WL 4456869, at *1. Mr. Gonzalez-Quezada was represented by
13 appointed counsel in the drug case and was convicted as charged after a jury trial in March 2007.
14 *Id.*; (Dkt. 20 (State Court Record, hereinafter “SCR”), Exh. 1, at 1.)

15 The state-court procedural history is convoluted: Mr. Gonzalez-Quezada withdrew his notice
16 of appeal in 2007; his 2007 personal restraint petition (“PRP”) was dismissed for failure to pay
17 the filing fee; another direct appeal was stayed pending a ruling by the state supreme court on a

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19 permitting respondent thirty (30) days from the date of the order adopting the Report and
20 Recommendation to file supplemental briefing to address Claim 3 on the merits. The
21 supplemental response would be noted for the fourth Friday after the filing; petitioner’s
22 supplemental response would be due on the Monday before the noting date; respondent’s
23 optional reply would be due on the noting date.

21 ² In 2009, Mr. Gonzalez-Quezada filed a § 2254 habeas petition in the stolen property case. *See*
22 *Gonzalez-Quezada v. Vail*, C09-168-RAJ-JPD (W.D. Wash., filed Feb. 6, 2009). In that habeas
23 case, the Court permitted Mr. Gonzalez-Quezada to delete unexhausted claims and to proceed
with his exhausted claims. Dkts. 20, 21, *Gonzalez-Quezada*, C09-168-RAJ-JPD. After receiving
supplemental briefing, the Court denied the fully exhausted claims on the merits and dismissed
the habeas petition with prejudice. Dkts. 26, 28, *Gonzalez-Quezada*, C09-168-RAJ-JPD.

1 relevant case; and in 2008 and 2010 on direct appeal he filed *pro se* statements and his counsel
2 filed briefs. (See SCR, Exh. 16, at 2 (2010 State Brief on direct appeal discussing the procedural
3 history); see also SCR, Exh. 6 (dismissing appeal in 2007); SCR, Exh. 9 (dismissing PRP based
4 on lack of filing fee); SCR, Exh. 14 (counsel's 2008 brief on behalf of Mr. Gonzalez-Quezada on
5 direct appeal); SCR, Exh. 15 (Mr. Gonzalez-Quezada's 2008 *pro se* statement on direct appeal);
6 SCR, Exh. 16 (counsel's 2010 brief on behalf of Mr. Gonzalez-Quezada on direct appeal); SCR,
7 Exh. 17 (Mr. Gonzalez-Quezada's 2010 *pro se* statement on direct appeal).) In November 2010,
8 the Washington Court of Appeals rejected Mr. Gonzalez-Quezada's argument on direct appeal
9 that the trial court has abused its discretion in denying his motion to proceed *pro se* in the drug
10 case. *Gonzalez-Quezada*, 2010 WL 4456869, at *1. The Washington State Supreme Court
11 denied the petitions for review filed by appellate counsel and by Mr. Gonzalez-Quezada *pro se*
12 on March 30, 2011. (SCR, Exh. 22.) The mandate on Mr. Gonzalez-Quezada's drug case issued
13 on April 20, 2011. (SCR, Exh. 23.)

14 On April 14, 2011, Mr. Gonzalez-Quezada filed his present § 2254 habeas petition along
15 with an application to proceed *in forma pauperis*. (Dkt. 1.) The petition is now ripe for
16 consideration.

17 II. DISCUSSION

18 The Court finds that Mr. Gonzalez-Quezada has failed to exhaust Claims 4 and 5 as federal
19 constitutional issues. The Court therefore recommends dismissing this matter without prejudice
20 as a "mixed" petition so that he may return to state court to exhaust his claims and return, if
21 necessary, to federal court with a § 2254 habeas petition containing only fully exhausted claims.
22 If, however, Mr. Gonzalez-Quezada elects in objections to this Report and Recommendation to
23 delete his unexhausted claims and to proceed only with the exhausted ones, the Court

1 recommends permitting respondent thirty (30) days to file supplemental briefing on Claim 3,
2 which respondent has not addressed on the merits.

3 **A. Exhaustion**

4 A federal court may not grant habeas relief to a state prisoner unless he has properly
5 exhausted his remedies in state court. *See* 28 U.S.C. § 2254(b); *Coleman v. Thompson*, 501 U.S.
6 722, 731 (1991). To satisfy the exhaustion requirement, a petitioner must “fairly present” his
7 claim in each appropriate state court, including the highest state court with powers of
8 discretionary review, thereby giving those courts the opportunity to act on his claim. *Baldwin v.*
9 *Reese*, 541 U.S. 27, 29 (2004); *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995); *see Casey v.*
10 *Moore*, 386 F.3d 896, 916 (9th Cir. 2004) (noting that “to exhaust a habeas claim, a petitioner
11 must properly raise it on every level of direct review”). A petitioner fairly presents a federal
12 claim only if he alerts the state court that his claim rests on the federal Constitution. *Fields v.*
13 *Waddington*, 401 F.3d 1018, 1020–21 (9th Cir. 2005). In order to alert the state court, a
14 petitioner must make reference to provisions of the federal Constitution or must cite either
15 federal or state case law that engages in a federal constitutional analysis. *Id.* “[F]or purposes of
16 exhaustion, a citation to a state case analyzing a federal constitutional issue serves the same
17 purpose as a citation to a federal case analyzing such an issue.” *Peterson v. Lampert*, 319 F.3d
18 1153, 1158 (9th Cir. 2003) (en banc).

19 Respondent concedes, and the Court agrees, that Mr. Gonzalez-Quezada exhausted Claims 1
20 and 2 by raising them as federal constitutional claims before the state court of appeals and the
21 state supreme court. (Dkt. 17, at 8; SCR, Exhs. 14, 15, 20, 21.) Respondent contends, however,
22 that Mr. Gonzalez-Quezada did not exhaust Claims 3, 4, and 5 because he did not fairly present
23 these issues as federal constitutional claims to the state courts. The Court finds that Mr.

1 Gonzalez-Quezada exhausted Claim 3 but did not exhaust Claims 4 and 5.

2 **1. Claim 3: Appearance of Fairness Doctrine**

3 In Claim 3, Mr. Gonzalez-Quezada argues that the trial court violated the appearance of
4 fairness doctrine. (Dkt. 11, at 8.) Respondent argues that although Mr. Gonzalez-Quezada
5 raised Claim 3 as a federal constitutional issue before the state court of appeals, he failed to raise
6 it in this manner before the state supreme court. (Dkt. 17, at 9.) The Court disagrees with
7 respondent.

8 In his *pro se* statement before the Washington Supreme Court, Mr. Gonzalez-Quezada
9 argued the following: “Under due process standards, the appearance of fairness doctrine, and
10 canon 3(D)(1), of the code of judicial conduct, a court should disqualify itself if it has bias
11 against a party or if its impartiality is reasonabl[y] questionable, *State v. Dominguez*, 81 Wn App
12 325, 328, 914 P2d 141 (1996).” (SCR, Exh. 21, at 8.) That argument is taken nearly verbatim
13 from *State v. Dominguez*, the state case that Mr. Gonzalez-Quezada cites: “Due process, the
14 appearance of fairness doctrine and Canon 3(D)(1) of the Code of Judicial Conduct (CJC) also
15 require a judge to disqualify himself if he is biased against a party or his impartiality may
16 reasonably be questioned. *In re Murchison*, 349 U.S. 133, 136 (1955); *State v. Madry*, 8 Wash.
17 App. 61, 68–70 (1972).” *State v. Dominguez*, 914 P.2d 141, 144 (Wash. Ct. App. 1996). The
18 Ninth Circuit sitting en banc has held that for exhaustion purposes a citation to a state case
19 evaluating a federal constitutional issue serves the same purpose as a citation to a federal case
20 analyzing such an issue. *See Peterson*, 319 F.3d at 1158. That is what occurred here: Mr.
21 Gonzalez-Quezada cited *Dominguez* (which cites a United States Supreme Court case) to support
22 his federal due process claim regarding judicial bias and the appearance of fairness with
23 reference to specific, alleged incidents. *See In re Murchison*, 349 U.S. at 136 (noting that “[a]

1 fair trial in a fair tribunal is a basic requirement of due process” and that “justice must satisfy the
2 appearance of justice”) (citation and quotation marks omitted). In fact, Mr. Gonzalez-Quezada
3 raised his federal constitutional claim more explicitly in his petition before the Washington
4 Supreme Court than he does in his federal habeas petition. (*Compare* SCR, Exh. 21, at 8 *with*
5 Dkt. 11, at 8–9.)

6 The Court finds that Mr. Gonzalez-Quezada fully exhausted Claim 3 by fairly presenting it
7 for review to each appropriate state court. The Court does not, however, suggest that it would be
8 inappropriate for him to reiterate this claim and its basis under the federal constitution in future
9 pleadings before the state courts.

10 **2. Claim 4: Conspiracy**

11 In Claim 4, Mr. Gonzalez-Quezada argues that the prosecution, the court, and his own
12 counsel engaged in a conspiracy to violate his rights. (Dkt. 11, at 9–10.) Respondent contends
13 that this argument was not fairly presented to the state court of appeals and to the state supreme
14 court as a federal constitutional claim. Respondent is correct.

15 In his *pro se* statements about Claim 4 before the Washington Court of Appeals, Mr.
16 Gonzalez-Quezada referred loosely to “TRASHING THE CONSTITUTION” but never
17 differentiated between the state and federal constitutions and cited no federal cases or state cases
18 that evaluated federal law. (*See* SCR, Exh. 15, at 31; SCR, Exh. 17, at 27.) Such vague
19 references to the Constitution do not satisfy the exhaustion requirement. *See Gray v. Netherland*,
20 518 U.S. 152, 162 (1996) (“[I]t is not enough [for exhaustion purposes] to make a general appeal
21 to a constitutional guarantee as broad as due process to present the ‘substance’ of such a claim to
22 a state court”). In his *pro se* statement to the Washington Supreme Court, Mr. Gonzalez-
23 Quezada also failed to make a fair presentation of the federal nature of Claim 4, referring entirely

1 to state criminal law. (SCR, Exh. 21, at 10–11.)

2 **3. Claim 5: Right to Appeal and Obstruction of Justice**

3 In Claim 5, Mr. Gonzalez-Quezada argues that the trial court violated his right to appeal and
4 obstructed justice. Respondent contends that this argument was not fairly presented to the state
5 court of appeals and to the state supreme court as a federal constitutional claim. The Court
6 agrees.

7 In his *pro se* statements about Claim 5 before the Washington Court of Appeals and the
8 Washington Supreme Court, Mr. Gonzalez-Quezada made no references to the federal
9 constitution, federal law, or state cases that analyzed federal law. (*See* SCR, Exh. 15, at 32–36;
10 SCR, Exh. 17, at 28–33; SCR, Exh. 21, at 11–12.) He did not, therefore, fairly present Claim 5
11 to the state courts as a federal constitutional claim.

12 **B. Options for Mixed Petitions**

13 Mr. Gonzalez-Quezada has submitted a “mixed” petition because Claims 1–3 are exhausted
14 while Claims 4 and 5 are unexhausted for federal habeas purposes. When faced with a mixed
15 petition, a district court may generally exercise one of three options: **(1)** dismiss the mixed
16 petition without prejudice to allow the petitioner to present his unexhausted claims to the state
17 court and then return to federal court to file a new habeas petition containing all of the claims;
18 **(2)** stay the mixed petition to allow the petitioner to present his unexhausted claims to the state
19 court and then return to federal court for review of his perfected petition; and **(3)** allow the
20 petitioner to delete the unexhausted claims and to proceed with the exhausted claims. *See Rhines*
21 *v. Weber*, 544 U.S. 269, 274-79 (2005). The Court recommends dismissing the mixed petition
22 without prejudice *unless* Mr. Gonzalez-Quezada elects to delete his unexhausted claims and to
23 proceed only with his exhausted claims.

1 **1. Dismissal Without Prejudice**

2 The option that best preserves all of Mr. Gonzalez-Quezada's federal habeas claims is
3 dismissal of the mixed petition without prejudice to returning later with his fully exhausted
4 petition. The mandate in Mr. Gonzalez-Quezada's direct appeal issued in April 2011, which
5 means that he has ample time before the state's one-year statute of limitations runs to return to
6 state court to file a PRP on the presently unexhausted claims. *See* RCW 10.73.090(1). Mr.
7 Gonzalez-Quezada has not requested a stay and abeyance, has not established good cause for
8 failing to exhaust Claims 4 and 5, and has not shown that those claims would be successful on
9 collateral attack in state court. *See Rhines*, 544 U.S. at 277–78 (holding that a stay should not be
10 granted absent good cause and noting that a district court would abuse its discretion by granting a
11 stay to exhaust meritless claims in the state courts). Furthermore, should the Court now consider
12 only his exhausted claims, Mr. Gonzalez-Quezada would face procedural obstacles should he
13 choose to bring a second or successive habeas petition to challenge his current conviction. *See*
14 *Burton v. Stewart*, 549 U.S. 147, 154 (2007) (noting that habeas petitioners proceeding with only
15 exhausted claims may risk subjecting later petitions that raise new claims to rigorous procedural
16 obstacles); *Cooper v. Calderon*, 274 F.3d 1270, 1272-73 (9th Cir.2001) (per curiam) (noting that
17 the relevant statutes greatly restrict the power of federal courts to award relief to state prisoners
18 who file second or successive habeas corpus applications); 28 U.S.C. § 2244(b) (providing that a
19 claim presented in a second or successive § 2254 habeas petition "shall" be dismissed unless
20 certain substantive and procedural requirements are met).

21 **2. Alternative: Deletion of Unexhausted Claims**

22 Nevertheless, should Mr. Gonzalez-Quezada in objections to this Report and
23 Recommendation state that he would prefer to delete his unexhausted claims and to proceed only

1 with his exhausted Claims 1–3, the Court recommends permitting the amended petition to be
2 considered on the merits. The state court of appeals rejected Claim 4 (conspiracy) because Mr.
3 Gonzalez-Quezada “has pointed to no facts suggesting impropriety.” *Gonzalez-Quezada*, 2010
4 WL 4456869, at *6. The state court of appeals rejected Claim 5 (denial of the right to appeal and
5 obstruction of justice) because it was rendered moot by the fact that the appellate court was
6 considering his appeal. *Id.* The Court cannot discern how these issues would be determined
7 differently should the state court choose to examine them with reference to the federal
8 constitution. Should Mr. Gonzalez-Quezada abandon the unexhausted Claims 4 and 5,
9 respondent should be directed to filing supplemental briefing on Claim 3 within thirty (30) days
10 of the order adopting this Report and Recommendation, to be noted for the fourth Friday after
11 filing, with Mr. Gonzalez-Quezada’s supplemental response due on the Monday before the
12 noting date and respondent’s optional reply due on the noting date.

13 **C. Evidentiary Hearing**

14 “[I]f the record refutes the applicant’s factual allegations or otherwise precludes habeas
15 relief, a district court is not required to hold an evidentiary hearing.” *Schriro v. Landrigan*, 550
16 U.S. 465, 474 (2007). Such is the case here. Mr. Gonzalez-Quezada is not entitled to an
17 evidentiary hearing because the record establishes that he has not yet exhausted Claims 4 and 5
18 in state court and he is not time-barred from returning to state court to do so.

19 **D. Certificate of Appealability**

20 If the district court adopts the Report and Recommendation to dismiss this matter without
21 prejudice, it must determine whether a certificate of appealability (“COA”) should issue. Rule
22 11(a), Rules Governing Section 2254 Cases in the United States District Courts (“The district
23 court must issue or deny a certificate of appealability when it enters a final order adverse to the

1 applicant.”). A COA may be issued only where a petitioner has made “a substantial showing of
2 the denial of a constitutional right.” *See* 28 U.S.C. § 2253(c)(3). A petitioner satisfies this
3 standard “by demonstrating that jurists of reason could disagree with the district court’s
4 resolution of his constitutional claims or that jurists could conclude the issues presented are
5 adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327
6 (2003).

7 The Court recommends that Mr. Gonzalez-Quezada not be issued a COA. No jurist of
8 reason could disagree with this Court’s decision to dismiss a mixed habeas petition or would
9 conclude that the issues presented deserve encouragement to proceed further given that Mr.
10 Gonzalez-Quezada may bring a new habeas petition with fully exhausted claims in the future.
11 Mr. Gonzalez-Quezada should address whether a COA should issue in his written objections, if
12 any, to this Report and Recommendation.

13 III. CONCLUSION

14 The Court finds that Mr. Gonzalez-Quezada has not exhausted his state-court remedies for
15 Claims 4–5, and therefore recommends **DISMISSING** the mixed habeas petition without
16 prejudice *unless* he elects, in objections to this Report and Recommendation, to delete the
17 unexhausted claims and to proceed only with the exhausted Claims 1–3. An evidentiary hearing
18 is unnecessary. The Court also recommends **DENYING** issuance of a certificate of
19 appealability. A proposed order accompanies this Report and Recommendation

20 DATED this 22nd day of November, 2011.

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BRIAN A. TSUCHIDA
United States Magistrate Judge